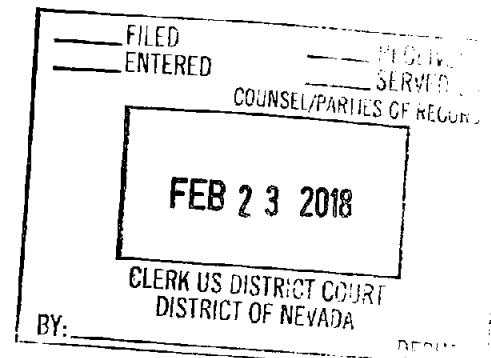


Omar Qazi

N.S.D.C.

2190 E. Mesquite Ave.

Pahrump, Nevada



UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA

Persecutor,

vs.

Omar Qazi

Accused.

Case No. 2:15-cr-00014-APG-VCF

JUDICIAL NOTICE OF BAD BEHAVIOUR

(Federal Rules of Evidence Rule 201)

Certification: This Judicial Notice is being filed timely.

COMES NOW, *Omar Qazi*, Sui Juris, by Special Appearance, hereby filing this Judicial Notice of Bad Behaviour. For the reasons outlined below, I request this court to take Judicial Notice of all these facts Pursuant to Federal Rules of Evidence Rule 201.

JUDICIAL NOTICE

This court held an evidentiary hearing on August 03, 2016 (Transcript of Proceedings – Dkt.# 215) (hereinafter "TOP") (See Exhibit #1, containing relevant portions, pgs. 70-81.) This hearing was in regards to several *Miranda* Issues, and it is important to note that the government stated that they will be addressing three issues at this hearing (1) the *Miranda* warnings in terms of sufficiency; (2) whether the defendant needed to be re-Mirandized; and (3) general voluntariness. See TOP, at 70-71.

However, this Judicial Notice will be specifically pertaining to the issue of voluntariness, and the court's intentional hinderance of a defense, without a fair opportunity to develop a full record of facts, all in a clear violation of the fundamental right to Due Process, and rulings of the U.S. Supreme Court. The United States Supreme Court has stated: "[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. 899, 909 (1997), citing *Harris v. Nelson*, 394 U.S. 286, 300 (1969).

In Dkt. # 204, I had informed the court:

"At the recent Evidentiary Hearing regarding the *Miranda* issue, I told Ms. Waldo that I wanted to testify at the Hearing and I was never asked by the Court if I wanted to testify, because I would have if I was given the opportunity to do so. My testimony would have proved several material facts..." *Id.* at 6.

Then in Dkt.# 228, I filed a Motion to Continue the Hearing, so that I can testify, and call detective Kitchen to the stand for several reasons:

"I want the opportunity to testify, as it should be my right. My testimony also would have provided several crucial facts..." "the evidentiary hearing should also be continued so that Detective Kitchen's testimony can be heard and examined..." "Detective Kitchen's testimony would also play a big role in determining my demeanor during the interrogation, if I was actually in a custodial interrogation (which is explained in a separate Motion - Motion to Review Stricken Docket # 174), which officers were present and if he had shown me a card which had details about a firearm on it. " *Id.* at 2.

1 However, the Court denied these necessary facilities and procedures for an adequate inquiry. If I
2 was granted an extended evidentiary hearing in the interest of justice, the court would have considered
3 my state of mind, and Detective Kitchen's coercive tactics under the totality of circumstances, which
4 ultimately forced an involuntary admission

5 Nonetheless, I had provided an Affidavit to the court, which was attached to Dkt.# 343, at 10-11,
6 where I mentioned, *inter alia*:

7 [I]f the 9th Circuit was to somehow rule in favor of the government (which is impossible), the
8 Court must then remand to the District Court for another evidentiary hearing on whether the
9 statement was voluntary or involuntary. A waiver of Miranda rights must be voluntary,
10 knowing, and intelligent. See *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed.
11 2D 410 (1986).

12 The accused clearly briefed some of the voluntariness issues (Dkt.# 191, at 2) and attempted to
13 argue this issue at the evidentiary hearing regarding *Miranda* rights (Dkt.# 198). Nonetheless,
14 the District Court mainly specified the hearing on the sufficiency of the *Miranda* warning
15 briefed in Dkt.# 192. However, this Court must be advised that this evidentiary hearing was
16 originally held due to Dkt. #129, Dkt.# 153, and related papers. The Magistrate Judge also
17 voiced his concern at the hearing regarding the voluntariness of the statement, and the accused
18 also expected to testify on this matter, but was not given an opportunity to do so.

19 The accused also maintains that when Officer Glover originally read the Miranda Warnings, he
20 did not reply that he understood those rights. Also, ex-detective Michael Kitchen's demeanor
21 was not only threatening but his actions were also deceptive and coercive given the totality of
22 the circumstances. First, ex-Detective Kitchen was wearing a ski mask when he interrogated
23 the accused. He was not in uniform nor did he have a badge that indicated he was an officer
24 and/or Detective. Next, the accused was taken quite a distance away from where he was
25 detained by officers; and the accused did not know who Mr. Kitchen was or what his intentions
26 were given his state of dress and the fact that the accused was pulled away from the scene near
27 an unmarked SUV at nighttime. Also, during the interrogation, Mr. Kitchen advised that the
28 decision as to whether the accused needed to go to jail rested on the "conversation" with Mr.

1 Kitchen. Throughout the interrogation, the accused repeatedly expressed that he did not want
2 to go to jail. Mr. Kitchen allowed the accused to falsely believe that if he cooperated and
3 provided a statement, he could avoid going to jail. That was never going to be the case, a fact
4 Mr. Kitchen was fully aware of prior to the interrogation. Mr. Kitchen capitalized on the
5 accused's fear of going to jail in order to coerce him into making incriminating statements.
6 Furthermore, he implied a promise that if you cooperate now, it will work out for you. Mr.
7 Kitchen then retrieved an index card from his left pocket with the details of the firearm on it
8 and proceeded to show the accused those details and took the approach that: I know it's yours,
9 if it's not yours it's your mother's gun.

10 These types of tactics were made to secure a confession through deception and coercion by
11 also implying that if you don't confess to possessing this gun, then your mother may be
12 charged. Therefore, even if Mr. Kitchen did not show the accused the details of the firearm, the
13 accused still would have felt compelled to confess in those circumstances, because his will
14 would have been overborne at that point. Law enforcement officials cannot extract a
15 confession "by any sort of threats or violence, or ... by any direct or implied promises, however
16 slight, or by the exertion of any improper influence." quoting *Hutto v. Ross*, 429 U.S. 28, 30,
17 97 S. Ct. 202, 50 L. Ed. 2d 194 (1976). False promises or threats may also render a confession
18 invalid. See, e.g., *Rogers v. Richmond*, 365 U.S. 534, 541-45, 81 S. Ct. 735, 5 L. Ed. 2d 760
19 (1961) (accused's confession was coerced when it was obtained in response to a police threat to
20 take defendant's wife into custody); *Lynnum v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 9 L.
21 Ed. 2d 922 (1963) (confession was found to be coerced when police officers told the accused
22 that state financial aid for her infant children would be cut off, and her children taken from her,
23 if she did not cooperate); *Spano v. New York*, 360 U.S. 315, 323, 79 S. Ct. 1202, 3 L. Ed. 2d
24 1265 (1959) (confession was found to be coerced when police officers instructed the accused's
25 childhood friend to falsely state the accused's telephone call had gotten him into trouble, that
26 his job was in jeopardy, and that loss of his job would be disastrous to his three children, his
27 wife, and his unborn child).

28 To ensure due process, the test for determining the voluntariness of a suspect's confession is

1 whether, considering all the circumstances, the government obtained the statement by physical
2 or psychological coercion or by inducement so that the suspect's will was overcome. See
3 United States v. Cutchavlis, 260 F.3d 1149, 1158 (9th Cir. 2001) (citing Haynes v.
4 Washington, 373 U.S. 503, 513-14, 83 S. Ct. 1336, 10 L. Ed. 2D 513 (1963)). In determining
5 the voluntariness of a confession, a court "examines whether a defendant's will was overborne
6 by the circumstances surrounding the giving of a confession." Dickerson v. United States, 530
7 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). "The line of distinction is that at
8 which governing self-direction is lost and compulsion, of whatever nature or however infused,
9 propels or helps to propel the confession." Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.
10 Ct. 1860, 6 L. Ed. 2D 1037 (1961). "In short the true test of admissibility is that the confession
11 is made freely, voluntarily, and without compulsion or inducement of any sort." Haynes, 373
12 U.S. at 513-14.

13 A waiver of *Miranda* rights "is knowing and intelligent if, under the totality of the
14 circumstances, it is made with a full awareness of both the nature of the right being abandoned
15 and the consequences of the decision to abandon it." United States v. Rodriguez-Preciado, 399
16 F.3d 1118, 1127 (9th Cir. 2005) (citations and quotations omitted). There is a presumption
17 against waiver, and the Government bears the burden of proving a valid waiver by a
18 preponderance of the evidence. See Colorado v. Connelly, 479 U.S. 157, 168, 107 S. Ct. 515,
19 93 L. Ed. 2d 473 (1986); United States v. Bernard S., 795 F.2d 749, 751 (9th Cir. 1986). "There
20 is a presumption against waiver . . . which the Government bears the burden of overcoming by
21 a preponderance of the evidence." United States v. Crews, 502 F.3d 1130, 1139-40 (9th Cir.
22 2007). The government can satisfy this burden by "prov[ing] that, under the totality of the
23 circumstances, the defendant was aware of the nature of the right being abandoned and the
24 consequences of such abandonment." *Id.* at 1140. "The government's burden to make such a
25 showing is great, and the court will indulge every reasonable presumption against waiver of
26 fundamental constitutional rights." Garibay, 143 F.3d at 537 (internal quotation marks
27 omitted).

28 The reviewing court looks at "the totality of all the surrounding circumstances - both the

1 characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*,
2 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Indeed, the court should take into
3 account a multitude of factors as part of its evaluation. See, e.g., *Withrow v. Williams*, 507
4 U.S. 680, 693, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993) (potential circumstances to consider
5 include police coercion; the length, location, and continuity of the interrogation; the
6 defendant's maturity, education, physical condition, and mental health; and "the failure of
7 police to advise the defendant of his rights to remain silent and to have counsel present during
8 custodial interrogation") (emphasis added); *Schneckloth*, 412 U.S. at 226 (the court must
9 examine "the factual circumstances surrounding the confession, assess[] the psychological
10 impact on the accused, and evaluate[] the legal significance of how the accused reacted"). The
11 Supreme Court has observed that "[t]he application of these principles involves close scrutiny
12 of the facts of individual cases." *Gallegos v. Colorado*, 370 U.S. 49, 52, 82 S. Ct. 1209, 8 L.
13 Ed. 2D 325 (1962)

14 Overall, the *Miranda* warnings given were clearly insufficient under *Miranda*. Under the
15 totality of these circumstances, there is also no way that the statement was voluntary, and a full
16 evidentiary hearing would have to be conducted to decide this matter properly.

17 However, those facts provided in the Affidavit were never addressed or opposed. Additionally, at
18 the unfairly limited evidentiary hearing, the government brought up the voluntariness argument, and
19 initially, the Magistrate acted concerned about the mask covering detective Kitchen's face, when he
20 mentioned:

21 THE COURT: You know, the mask is a little disconcerting, I
22 would think; right? TOP. at 74.

23 Thereafter, the following argument ensues:

24 MS. MICHAEL: Correct, Your Honor. But in terms of the
25 defendant being scared or threatened --

26 THE COURT: Oh.

27 MS. MICHAEL: -- the defendant -- we don't know the
28 defendant's state of mind.

1 THE COURT: State of mind. All right. True.

2 MS. MICHAEL: So -- so what the Government is arguing is that
3 what we do have and what is required under the case law is to
4 look at the totality of the circumstances. Obviously the
5 Government's required to show that the waiver was voluntary.
6 However, if the defense is trying to say that -- I'm sorry, a
7 statement was obtained involuntarily, they have to show
8 coercion on behalf of law enforcement, and just making
9 arguments that, you know, someone felt threatened or
10 uncomfortable or didn't know if he was law enforcement or
11 not, I don't believe that's what the totality of the
12 circumstances or the evidence provided to the Court supports.
13 It is quite a high -- a high standard, Your Honor, and I do
14 have a few cases that I -- that I can note in terms, Your
15 Honor, where confession is involuntarily coerced, either by
16 physical intimidation or **psychological pressure**, which is
17 *United States vs. Haswood*, 350 F.3d 1024, 1027, Ninth
18 Circuit. "In determining whether defendant's confession was
19 voluntary, **the question is whether the defendant's will was**
20 **overborne at the time he confessed.**" That's *Clark vs. Murphy*,
21 331 F.3d 1062, at 1072, Ninth Circuit. There's additional
22 quotations for that. And the -- "In the end result, **we must**
23 **consider the totality of the circumstances involved and their**
24 **effect upon the will of the defendant,**" and that's *U.S. vs.*
25 *Crawford*, which is also a Ninth Circuit case that was citing
26 -- I'm sorry, *Schneckloth vs. Bustamonte* but, I guess my
27 point, Your Honor, is that just based -- based what's on --
28 what's on the record, and that's why I specifically wanted to

1 play the defendant's statement - TOP, at 75-76.

2 Thereby, the government admitted that they had a high burden to show that a confession was
3 voluntary, and they clearly haven't met that burden. My testimony would have provided my "state of
4 mind," and it was required that the court "must consider the totality of the circumstances involved and
5 their effect upon the will of the defendant." See United States v. Crawford, 372 F.3d 1048, 1060 (9th Cir.
6 2004). However, the court did not consider how my will was overborne, and how the questioning
7 affected my will.

8 Nonetheless, it is quite interesting that the magistrate acknowledged *sua sponte* that there was a
9 serious issue with the questioning by Kitchen which influenced the admission, when he stated:

10 THE COURT: I mean, it was certainly an admission that was
11 motivated by the questioning, but there must be a line there
12 in the -- in the continuum of getting someone to talk. And,
13 you know, there's no question . . . "Your kids are in the
14 next room and I'm not going to let them out until you tell
15 me." All right. But, you know, that wasn't -- clearly not
16 that. But it is on the continuum here. I have to give it some
17 serious thought. TOP, at 78.

18 Furthermore, the most disturbing part of this hearing is the following discussion:

19 MS. MICHAEL: -- and experience in the past as to whether,
20 you know, this is a law enforcement officer taking advantage
21 of let's say a juvenile, or taking advantage of someone who
22 has never had any contact with law enforcement before, or --
23 you know, or doing it down at a station house, in a more
24 custodial setting. Those are scenarios where I believe
25 courts have found that that is what pressures someone to
26 confess. Because the whole point is, no one wants a
27 confession that is not -- that is not credible.

28 THE COURT: Let me -- let me just maybe redirect things a

1 little bit.

2 MS. MICHAEL: Yes, Your Honor.

3 THE COURT: If -- of course, if I were to find that the
4 standard Miranda card that was used back then, you know,
5 doesn't comport with Ninth Circuit case law and so it wasn't
6 a good enough warning, the content of the warning was
7 defective, **then the voluntariness is no longer an issue;**
8 right? I mean, that's the end of the inquiry. So why don't
9 you focus on that. TOP, at 80-81.

10 By this discussion, it is evident that the Magistrate did not want this hearing to get fully involved
11 in the voluntariness issue, and directs the attorneys to focus on the sufficiency of the Miranda warning
12 instead. Even the government was insinuating that the confession may not have been credible, and was
13 suggesting the court to inquire further on this specific matter, as required by law. Instead the magistrate
14 went beyond his judicial authority, and became a second prosecutor in violation of the law.

15 This was judicial misconduct by both of the judges in this case, by not allowing me to testify on
16 my own behalf, not knowing my state of mind, knowing well that I wanted to testify, and for not
17 continuing the hearing to have detective Kitchen testify; all of this being unfairly executed in a clear
18 violation of Due Process, and Constitutionally protected rights.

19 "The fundamental requirement of due process is the opportunity to be heard at a meaningful time
20 and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18
21 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2D 62 (1965)).
22 Government actions which "offend the canons of decency and fairness" violate the due process
23 protection of the Constitution." Rochin v. California, 342 U.S. 165, 169, 72 S. Ct. 205, 96 L. Ed. 183
24 (1952)

25 This issue can not be ignored simply because the *Miranda* warning was deficient. The
26 government's current appeal in the Ninth Circuit based on the defective *Miranda* warning would
27 not have been pursued if the court also held my statements to be involuntary. Due to the court's
28 intentional hinderance, in violation of the Sixth Amendment to the Constitution, I was not able to

1 present these facts. I have been awaiting the government's appeal since January 04, 2017, without
 2 a projected trial date; due in part, to the court's actions.

3 Additionally, the U.S. Supreme Court in *United States v. Loud Hawk*, 474 U.S. 302, 88 L. Ed. 2d
 4 640, 106 S. Ct. 648 (1986), held that "a delay resulting from an appeal would weigh heavily against the
 5 Government if the issue were clearly tangential or frivolous." *Id.* at 315-16. Additionally, a crucial factor
 6 in *Loud Hawk* was whether the record showed "bad faith or dilatory purpose on the Government's part."
 7 *Id.* at 316. In this case, the record clearly reflects bad faith, and a dilatory purpose on the government's
 8 part.

9 These actions by the judges, demonstrates a sample of the Bad Behaviour, among the many
 10 instances of this behaviour occurring in the case at hand, which are unlawful violations of the
 11 Constitution for the United States of America.¹

12 CONCLUSION

13 For the reasons mentioned above, I request this court to take Judicial Notice of all these facts
 14 Pursuant to Federal Rules of Evidence Rule 201, and request the Chief District Judge for the District of
 15 Nevada to reassign different judges to this case, further directing a new district judge to hold an
 16 evidentiary hearing on the specific voluntariness issue referenced above.

17 I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true
 18 and correct, and that this document is executed without the benefit of a notary pursuant to NRS 208.165,
 19 as I am a prisoner confined in a private prison within this state of Nevada.

20 Executed on February 20, 2018.

21 Respectfully submitted,

22 All Rights Reserved and Without Prejudice,

23 *Omar Qazi*

24 Signed: 

25
 26
 27
 1 ¹ "The Judges, both of the supreme and inferior Courts, *shall hold their Offices during good Behaviour.*" Article III, § 1 (emphasis added)

EXHIBIT #1

1 (Proceedings resumed at 11:53:17 a.m.)

2 COURTROOM ADMINISTRATOR: Please rise.

3 THE COURT: Thank you. Please be seated.

4 COURTROOM ADMINISTRATOR: This is the conclusion of
5 USA vs. Omar Qazi, 2:15-cr-14-APG-VCF.

6 THE COURT: Hope -- hopefully it's the conclusion. I
7 realize that we need to talk, I guess, briefly about
8 Detective Kitchen. Do you still think you need to call him for
9 any reason, Ms. Waldo?

10 MS. WALDO: Not at this time, Your Honor.

11 THE COURT: Okay. So it is the conclusion.

12 So, as I said, the Government has the burden. So,
13 I'll hear from the Government first on the issue of the timing
14 of the warning and also its content.

15 MS. MICHAEL: Yes, Your Honor.

16 Your Honor, I had sort of prepared to address all
17 three. So, as I understand it, we had the three issues in
18 front of us; the Miranda warnings in terms of sufficiency.
19 However, we've established what those warnings are. We've
20 briefed them. And that's really a question of law at this
21 point. There was also --

22 THE COURT: Sufficiency. Okay. Sufficiency is one.

23 MS. MICHAEL: There was also the issue of whether the
24 defendant needed to be re-Mirandized, which, again, the
25 Government's position is that's a legal issue and I do believe

1 both parties argued it. However, the Government still stands
2 by the fact that the defense or defendant has not provided any
3 case law to support that that was required, whereas the
4 Government did provide case law saying --

5 THE COURT: Hold on. What's the third issue then?

6 MS. MICHAEL: The third issue is -- is sort of the
7 general voluntariness --

8 THE COURT: Voluntariness. Oh, okay.

9 MS. MICHAEL: -- the Government believes. So I guess
10 I just parsed them out to try and keep it -- the argument --

11 THE COURT: No. That's fine. Let's do all three.
12 Perfect. Yes.

13 MS. MICHAEL: But obviously the voluntariness sort of
14 plays in to the others as well.

15 THE COURT: Um-hmm.

16 MS. MICHAEL: But, um . . . but, again -- yeah.
17 Again, in terms of the re-Mirandizing being required, I don't
18 believe defense has provided any case law that supports that
19 that had to have been done in this case. But I guess,
20 Your Honor, that plays in to this -- the facts and
21 circumstances.

22 As it stands, I do believe both parties are in
23 agreement on the facts and circumstances in the sense of the
24 time frame between when the defendant received Miranda rights
25 from Officer Glover and then the time that he was interviewed

1 by Detective Kitchen. There is that difference in time frame.
2 The difference in location, which now has been a little more
3 explained on the record by use of the body camera footage and
4 by the witnesses, which I believe feeds into the Government's
5 argument that it wasn't a significant change in location. It
6 wasn't a significant change in terms of who was present.

7 And just generally, in terms of there being some sort
8 of break in the time frame or the encounter the defendant was
9 having with law enforcement, again, I don't believe that there
10 have been any facts on this record to show that there was any
11 substantial break in time, location, and again, as the
12 Government had provided in the case law, even if there's a
13 change in who the defendant's speaking with, that doesn't
14 create a problem in terms of him having to be re-Mirandized by
15 the new individual. So, Your Honor, I do believe the facts
16 that have been put forth on the record from witnesses and from
17 the evidence do support that he did not to be -- did not need
18 to be re-Mirandized.

19 Now, Your Honor --

20 THE COURT: Hold on. Hold on. Hold on a minute.

21 MS. MICHAEL: Oh, yes. Of course.

22 THE COURT: So, while we're on that part, I -- I was
23 trying to listen and pay attention. You know, we certainly
24 know what time he was Mirandized. It seems very clear that it
25 was at 1609. That's on Exhibit 1, I think; right?

1 Let me see . . . 1553 was the stop and . . .

2 MS. MICHAEL: Five lines down I do believe it says
3 1609. That's what Officer Glover testified -- or
4 Detective Glover testified to.

5 THE COURT: Oh, yeah. Read Miranda 1609.

6 Now, what time did -- you know, can we pick out a
7 time when the interview started? The transcript, you know, a
8 lot -- it says 1913 hours.

9 MS. MICHAEL: And I did -- I did actually confer with
10 defense counsel to make sure that we were understanding. We
11 both utilized that time frame.

12 THE COURT: Okay.

13 MS. MICHAEL: However, since then we've also
14 discovered that the date on there unfortunately appears to be
15 incorrect, but we were both utilizing that time frame for our
16 argument, so that's what we had both relied upon.

17 THE COURT: You know what? We can sort of
18 double-check to the extent this -- these Exhibits 1 and 2 are
19 in here.

20 MS. MICHAEL: Yes.

21 THE COURT: Let's see . . . it shows that -- looks
22 like Kitchen -- the first time his name shows up is 1854.
23 Kitchen and Rotta show up and then I -- I mean, I don't know
24 what all these codes are, but that's the first time he shows up
25 and . . . that would make about -- that would make about right.

1 MS. MICHAEL: Correct.

2 THE COURT: So I --

3 MS. MICHAEL: And that's what defense counsel was
4 just pointing out, that it appears to be an accurate time frame
5 based on when you look at it, in connection with the CAD --

6 THE COURT: Okay.

7 MS. MICHAEL: -- and the unit log.

8 THE COURT: So I'm going to find that the warning was
9 at 1609 and the interview started at 1913. Okay. Great.
10 Go ahead.

11 MS. MICHAEL: And then, Your Honor, I do believe the
12 last sort of set of facts that were presented by defense
13 counsel, again, the Government was interpreting that as a
14 voluntariness argument where defense was talking about what
15 Detective Kitchen was wearing, whether he identified himself as
16 a police officer, the facts --

17 THE COURT: You know, the mask is a little
18 disconcerting, I would think; right? I mean, where -- what's
19 a -- you know, a citizen is arrested and then, you know, Rotta
20 shows up. Apparently he's got the badge, so that's a little
21 reassuring but then he brings him over to some character in --
22 you know, with a -- with a -- hiding his face. I mean, that --
23 isn't that -- wouldn't that cause you concern if you were the
24 defendant?

25 MS. MICHAEL: Well, Your Honor, I -- perhaps. But

1 the problem is there hasn't been that information placed on the
2 record, in terms -- it was just an argument. No one is --

3 THE COURT: No. No. He -- he said -- because
4 Officer -- or Officer Rotta said that it was standard practice
5 for this detective, because he was an undercover detective, he
6 had distinctive facial hair and things of that nature, that he
7 would hide his face when he would interview a witness.

8 MS. MICHAEL: Correct, Your Honor. But in terms of
9 the defendant being scared or threatened --

10 THE COURT: Oh.

11 MS. MICHAEL: -- the defendant -- we don't know the
12 defendant's state of mind.

13 THE COURT: State of mind. All right. True.

14 MS. MICHAEL: So -- so what the Government is arguing
15 is that what we do have and what is required under the case law
16 is to look at the totality of the circumstances. Obviously the
17 Government's required to show that the waiver was voluntary.
18 However, if the defense is trying to say that -- I'm sorry, a
19 statement was obtained involuntarily, they have to show
20 coercion on behalf of law enforcement, and just making
21 arguments that, you know, someone felt threatened or
22 uncomfortable or didn't know if he was law enforcement or not,
23 I don't believe that's what the totality of the circumstances
24 or the evidence provided to the Court supports.

25 It is quite a high -- a high standard, Your Honor,

1 and I do have a few cases that I -- that I can note in terms,
2 Your Honor, where confession is involuntarily coerced, either
3 by physical intimidation or psychological pressure, which is
4 *United States vs. Haswood*, 350 F.3d 1024, 1027, Ninth Circuit.
5 "In determining whether defendant's confession was voluntary,
6 the question is whether the defendant's will was overborne at
7 the time he confessed." That's *Clark vs. Murphy*, 331 F.3d
8 1062, at 1072, Ninth Circuit. There's additional quotations
9 for that. And the -- "In the end result, we must consider the
10 totality of the circumstances involved and their effect upon
11 the will of the defendant," and that's *U.S. vs. Crawford*, which
12 is also a Ninth Circuit case that was citing -- I'm sorry,
13 *Schneckloth vs. Bustamonte* but, I guess my point, Your Honor,
14 is that just based -- based what's on -- what's on the record,
15 and that's why I specifically wanted to play the defendant's
16 statement --

17 THE COURT: Um-hmm.

18 MS. MICHAEL: -- so Your Honor could hear the
19 demeanor of Detective Kitchen and the response of the
20 defendant -- I mean, there's -- there's quite a few facts that
21 support that it was not coerced.

22 THE COURT: Um-hmm.

23 MS. MICHAEL: The casualness of the encounter.
24 Your Honor can hear the tone of Detective Kitchen and the tone
25 of the defendant. I mean, if he was so scared, he doesn't

1 scream out for help. He doesn't say, "Who are you? What's
2 happening?" There's -- there's nothing to indicate that. He's
3 been in police custody the entire time. I mean, even based on
4 the defendant's statement himself, this is not his first
5 encounter with law enforcement. He did ask questions of the
6 patrol units. I'd say it would be unreasonable for anyone to
7 assume that some random person is going to show up with a mask
8 and ask them questions and then provide personal information
9 such as your date of birth, Social Security number, your ---
10 your prior criminal history. You know, he knows he's talking
11 to a police officer. And I think it's very clear from how he
12 responds that he's not threatened or coerced into doing
13 anything. I understand, Your Honor, that some of the tactics
14 may not be looked upon favorably by some individuals, but none
15 of the interrogation -- none of the ways that Detective Kitchen
16 interrogated him, according to, again, case law, are a problem.
17 He didn't make --

18 THE COURT: Well, yeah. I -- yeah. Because I -- I
19 think, you know, naturally when you're reading along with the
20 transcript and you're hearing the words, and there's no
21 question that the detective was a very experienced
22 interviewer/interrogator and he used his experience to motivate
23 the defendant to change his position. Because at the beginning
24 he was saying, "No, I don't know anything about it," you know,
25 the car was maybe broken into, "I never" -- and then, of

1 course, at the end of the time he changed his story and
2 obviously he wouldn't have changed his story had not Detective
3 Kitchen sort of taken him down the road. But the question is,
4 is that -- I think what you're saying, does that really amount
5 to making it an involuntary admission.

6 MS. MICHAEL: Correct.

7 THE COURT: I mean, it was certainly an admission
8 that was motivated by the questioning, but there must be a line
9 there in the -- in the continuum of getting someone to talk.
10 And, you know, there's no question . . . "Your kids are in the
11 next room and I'm not going to let them out until you tell me."
12 All right. But, you know, that wasn't -- clearly not that.
13 But it is on the continuum here. I have to give it some
14 serious thought. So, go ahead and finish --

15 MS. MICHAEL: Oh -- I'm --

16 THE COURT: -- but I just want to let you know where
17 I'm going here.

18 MS. MICHAEL: Understood, Your Honor.

19 And I think what, again, helps in terms of facts at
20 looking at that, look at where the interview took place.

21 THE COURT: Um-hmm.

22 MS. MICHAEL: You know, it's outside. It's in the
23 presence of two officers. Look at the length of the interview.
24 We're talking about 19 minutes, at most. We're not talking
25 about hours and hours of a detective going over and over

1 something.

2 Also look at the language in the questions that are
3 used. Detective Kitchen doesn't particularly change anything
4 he's asking or saying at the point that the defendant does, in
5 fact, confess. You know, the defendant felt strong enough or
6 comfortable enough to deny it all the way up to about -- until
7 about 15 minutes into the interview, and there's nothing
8 particular that Detective Kitchen does or changes in the way of
9 his interrogation that causes the defendant to change his
10 answer. It's almost surprising. You almost miss it when you
11 read the transcript --

12 THE COURT: Well --

13 MS. MICHAEL: -- because he just says, "How long have
14 you had the gun?" and all of a sudden he says, "Oh, I don't
15 know, two or three weeks." I mean, there's --

16 THE COURT: A couple of weeks. Yeah.

17 MS. MICHAEL: -- there's -- there's -- it really is
18 something you could almost miss if you were not specifically
19 looking for it because -- because of how the conversation
20 occurred. So I think those are the factors that are really
21 important to look at, you know, the time frame, the questions,
22 the demeanor, the location.

23 You know, and even when he gave that response, it
24 didn't -- again, you know, the -- it's not like the detective
25 smelled blood or anything and kept asking and getting more

1 aggressive. He just asked him a couple more follow-up
2 questions, you know, about the gun and continued.

3 And he didn't specifically make any promises or
4 threats. Obviously they talk generally about individuals
5 cooperating or not cooperating. You know, and again, this is
6 an individual -- and this is from his statement -- who has had
7 encounters with law enforcement before and throughout that
8 talks about understanding the circumstances and understanding
9 the situation. So, that is part of the Court's analysis, it
10 can be, is the defendant's personal history --

11 THE COURT: Um-hmm.

12 MS. MICHAEL: -- and experience in the past as to
13 whether, you know, this is a law enforcement officer taking
14 advantage of let's say a juvenile, or taking advantage of
15 someone who has never had any contact with law enforcement
16 before, or -- you know, or doing it down at a station house, in
17 a more custodial setting. Those are scenarios where I believe
18 courts have found that that is what pressures someone to
19 confess. Because the whole point is, no one wants a confession
20 that is not -- that is not credible.

21 THE COURT: Let me -- let me just maybe redirect
22 things a little bit.

23 MS. MICHAEL: Yes, Your Honor.

24 THE COURT: If -- of course, if I were to find that
25 the standard Miranda card that was used back then, you know,

1 doesn't comport with Ninth Circuit case law and so it wasn't a
2 good enough warning, the content of the warning was defective,
3 then the voluntariness is no longer an issue; right? I mean,
4 that's the end of the inquiry.

5 So why don't you focus on that.

6 MS. MICHAEL: On that. Yes, Your Honor. I can do
7 that.

8 And, Your Honor, in terms of the Miranda issue, what
9 I'd like to point out, you know, obviously I understand that
10 defense counsel has briefed this, but I do believe their
11 briefing and argument is a little bit misguided. Miranda
12 analysis by courts, it's not a one-size-fits-all type of
13 scenario. I think the courts have been very clear that there
14 are four rights that Miranda requires and I just -- you know,
15 Your Honor, I'm just going to read them real quickly.

16 THE COURT: Okay.

17 MS. MICHAEL: That the defendant has the right to --

18 THE COURT: Take your time.

19 MS. MICHAEL: That's okay.

20 That the defendant has the right to remain silent;
21 that anything he says can be used against him in a court of
22 law; that he has the right to the presence of an attorney; and
23 that if he cannot afford an attorney, one will be appointed for
24 him prior to any questioning if he so desires.

25 THE COURT: Yeah, but there is that Ninth Circuit

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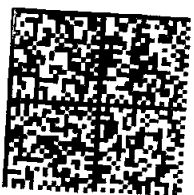
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